IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 22 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SAMJUBEN BHIKHABHAI

Versus

KOLI LALJI NAKU

Appearance:
MR UI VYAS for appellants
MR AJAY R.MEHTA for MR RAJNI H MEHTA for Respondent No.3
No one has appeared on behalf of respondents nos.1 & 2
despite service

CORAM : MR.JUSTICE M.R.CALLA
Date of decision: 13/01/2000

ORAL JUDGEMENT

This appeal under Section 110-D of the Motor Vehicles Act is directed against the award passed by the

Motor Accident Claims Tribunal, Bhavnagar in M.A.C. Case No. 64 of 1977 decided on 2.2.1979 whereby it has been ordered that the claimants may recover a sum of Rs.39,000/- from the opponents nos.1 and 2, i.e. respondents nos.1 and 2 in this appeal. The interest has been granted at the rate of 6% per annum from the date of application till realisation with proportionate costs. The application was dismissed against the Insurance Company and directions have also been issued for apportionment of the total amount to the respective applicants-claimants.

2. On 16th April 1977, deceased Bhikhabhai was travelling in a public career truck with an aluminium container containing 2 kg. of Ghee therein to be sold at Mahuva. The truck driver was paid the amount of hire for the goods as well as the travel of the deceased himself. The respondent no.1 herein was the driver and the allegation is that he was driving the vehicle in a rash and negligent manner at excessive speed. The truck went off the road and turned turtle. The deceased was thrown off, he received injuries and was found dead on the spot. The appellant no.1 is the widow of deceased Bhikhabhai and appellant no.2 is the mother, while appellants nos.3, 4 and 6 are daughters of the deceased, appellant no.5 is the son of the deceased. The respondents nos.1 and 2 are the driver and owner of the vehicle respectively and the respondent no.3 is the Insurance Company. The vehicle was insured with the New India Assurance Co.Ltd., i.e. respondent no.3. The claimants filed the claim for Rs.80,000/- as compensation and stated that the deceased was earning Rs.300/- per month and at the time of accident, the respondent no.1 was in the employment of the respondent no.2. This claim as was filed by the claimants before the Motor Accident Claims Tribunal was opposed on behalf of the respondents by filing written statement at Exh.13. It was denied that the deceased was travelling in the vehicle No.GTS 6327 on 16th April 1977. It has also been denied that he was carrying aluminium container containing Ghee. The stand has been taken that the respondent no.1, i.e. driver told the deceased that there was no room in the truck, but the deceased tried to get into the truck through the side way and in this process, he fell down because of his own negligence. The allegation of rash and negligent driving has also been denied. It has also been denied that the truck was being driven at a high speed. It has also been denied that the deceased was earning Rs.300/- per month and it has been stated that the claim of Rs.80,000/- was exaggerated. The Insurance Company also filed reply at Exh.22 and its case is that the driver was never negligent and rash in

driving the vehicle and the claim is an exaggerated one. Further, that the Insurance Company was not liable and the liability of the Insurance policy was limited and further that deceased Bhikhabhai was unauthorised passenger and, therefore, the Insurance Company was not liable for payment of compensation and therefore, the claim be dismissed.

3. By the impugned order dated 2nd February 1979, two claims, i.e. M.A.C. Cases Nos.64 of 1977 and 66 of 1977 have been decided with regard to the same accident, however, the present appeal has been filed only by the claimants of Claim Case No.64 of 1977 and therefore, it is not necessary for this Court to deal with the facts with regard to the Claim Case No.66 of 1977 and the challenge against the award is considered only with regard to the claim in Claim Case No.64 of 1977.

4. The grievance has been raised that the award should have been passed for the total amount of compensation of Rs.80,000/- instead of 39,000/- and that the award should also have been passed against the Insurance Company whereas it has been kept confined against the respondents nos.1 and 2 only.

5. In support of the claim, the claimant Samjuben, i.e. widow of the deceased is examined at Exh.28, one Shri Lalji has been examined at Exh.32 and Jamsang Vakhuba was examined at Exh.30. The scene of the offence, panchnama is at Exh.26, the medical certificate is at Exh.34 and the post mortem note is produced at Exh.33.

6. According to the evidence of Jamsang Vakhuba at Exh.30, on the day of the accident, he boarded the truck at village Moti Jagdhar. He paid Re.1/- to the driver for going to Mahuva. He says that at village Longadi, two persons boarded the truck along with one girl. They were going for taking medicine and a sum of Rs.3/- was paid to the driver. The truck was being driven at a high speed. Between village Rosa and Bhesla Hanuman, the truck containing bags of superb fertilizers turned turtle. The person who boarded the truck at village Longadi expired on the spot and bags of superb fertilizers fell on him. This witness says that he also fell down and bags of superb fertilizers fell on him. He was then taken to Mahuva Hospital and was kept there for about 13 days. The suggestions made to him that he did not pay Re.1/- to the driver and that he had boarded from Longadi, but these suggestions were denied. The suggestion that the driver had told him not to board the

truck has been denied. The suggestion that he boarded the truck when truck was in motion has also been denied. The witness says that he knew that the passengers were not permitted to travel by truck and that the service of S.T. bus is also available on this route. The other side witness Lalji (driver respondent no.1) at Exh.32 has stated that he was taking fertilizers from Bhavnagar and was going towards Rajula. He has stated that at village Longadi, people were standing in the midst of the road to stop the truck. The truck was stopped and the persons who wanted to board the truck were told that there was no room in the truck and the truck was started. He has also stated that deceased Bhikhabhai tried to board the truck while the truck was in motion and at that time, the hook of the carrier gave way and the bags of fertilizers fell on him and he fell down on the road underneath the bags and thereupon he expired. However, this witness, i.e. driver has admitted that the truck had turned turtle and Jamsang's leg was injured. On the basis of the evidence, it is found that the accident did take place on the said date, i.e. 16th April 1977 and deceased Bhikhabhai expired in this accident. Thus, the factum of the accident, the rash and negligent driving by the respondent no.1 and the death of Bhikhabhai in this accident are the facts which are proved.

7. No evidence was led to show that deceased Bhikhabhai was not earning Rs.300/- per month. The Tribunal has rightly come to the conclusion that he was earning Rs.300/- per month. After deducting one third amount therefrom, the income has been taken to be Rs.200/- per month; multiplied by 12, it comes to Rs.2,400/- per annum; multiplier of 15 years has been applied looking to the facts of the case and thus, the income has been computed to be Rs.36,000/-; Rs.3,000/has been assessed notional damage and accordingly the compensation to the extent of Rs.39,000/- has been awarded against the respondents nos.1 and 2, while the claim against the Insurance Company has been rejected.

8. On consideration of the evidence and the material available on record, this Court finds that the Tribunal has not committed any error in awarding the compensation of Rs.39,000/- to the claimants and it cannot be said that instead of Rs.200/-, Rs.250/- should have been taken to be the monthly contribution of the deceased to the family. While considering the income for the purpose of compensation and while applying the multiplier, the same has been appropriately applied to the maximum possible extent in favour of the claimants and thus, the amount of compensation as has been awarded does not warrant any

interference by this Court so as to increase the same from Rs.39,000/- to any higher amount or to find that the additional compensation of Rs.41,000/- may be awarded now.

9. So far as the grievance that no award has been passed against the Insurance Company, Mr.Mehta has cited a decision of the Supreme Court in the case of Smt. Mallawwa etc. v. The Oriental Insurance Co. Ltd. & Ors. reported in JT 1998 (8) SC 217 yesterday when the matter was heard for some time. Mr.Vyas for claimants sought a day's time to go through the above case and therefore the matter was posted for today. However, Mr.Vyas has not turned up today. The argument raised by Mr.Mehta that only if the vehicle is used systematically for carrying the passengers, that is a vehicle which is used in accordance with law for the purpose of carrying the passengers for hire and reward that the Insurance Company can be held liable for compensation. In the instant case, it is proved that the deceased was travelling in a truck and it is not permissible for a truck to carry the passengers. It is essentially a goods carrier and it cannot carry any passengers. In the aforesaid decision of Smt.Mallawwa (supra) it has been considered in para 10 of the judgment that:

> "For the purposes of Section 95, ordinarily a vehicle could have been regarded as a vehicle in which passengers have carried if the vehicle was of that class. Keeping in mind the classification of vehicles, by the Act, the requirement of registration with particulars including the class to which it belonged, requirement of obtaining a permit for using the vehicle for different purposes and compulsory coverage of insurance risk, it would not be proper to consider a goods vehicle as a passenger vehicle on the basis of a single use or use on some stray occasions at that vehicle for carrying passengers for hire or reward. For the purpose of construing a provision like proviso (ii) to Section 95(1)(b), the correct test to determine whether a passenger was carried for hire or reward, would be whether there has been a systematic carrying of passengers. Only if the vehicle is so used then that vehicle can be said to be a vehicle in which passengers are carried for hire or reward."

The Supreme Court also expressed that divergent views have been expressed in this regard by various High Courts

and it has been observed by the Supreme Court that, all the relevant aspects were not taken into consideration while expressing one view or the other. The Supreme Court has made reference a decision of Orissa High Court in the case of New India Assurance Co. Ltd. v. Kanchan Bewa Ors., reported in 1994 ACJ 138. Paras 18, 19, 22 and 23 of this Full Bench decision of the Orissa High Court have been quoted under para 10 in the case of Smt.Mallawwa (supra) by the Supreme Court and in para 11 it has been opined by the Supreme Court that view taken by Orissa High Court is correct and the view expressed by the other High Courts was to be regarded as incorrect.

10. According to the Full Bench of Orissa High Court, to find out whether an insurer would be liable to indemnify an owner of a goods vehicle in such a case the mere fact that the passenger was carried for hire or reward would not be enough; it shall have to be found out as to whether he was the owner of the goods, or an employee of such an owner, and then whether there were more than six persons in all in the goods vehicle and whether the goods vehicle was being habitually used to carry passengers and thus, the position would become very uncertain and would vary from case to case and the production of such result would not be conducive to the advancement of the object sought to be achieved by requiring a compulsory insurance policy. A Full Bench decision of the Rajasthan High Court allowing the goods vehicle to be taken within the proviso (ii) was differed and it was held that sub-section (2) of Section 95 specifies the limits of liability and clause (a) deals with goods vehicle and in so far as the person travelling in a goods vehicle is concerned, the liability is confined to the employees only. It was, therefore, held by Orissa High Court that this was an indicator and almost a sure indicator of the fact that legislature did not have in mind carrying of either the hirer of the vehicle or his employee in the goods vehicle, otherwise clause (a) would have provided a limit of liability regarding such persons also.

11. In the aforesaid case of Smt.Mallawwa (supra) the Supreme Court also considered as to whether the decision of the Supreme Court rendered earlier in the case of Pushpabai Purshottam Udeshi and ors. v. M/s.Ranjit Ginning and Pressing Co. and anr., reported in AIR 1977 SC 1735 was required to be reconsidered. In para 12 of Smt.Mallawwa's case (supra), the Supreme Court has found that the case of Pushpabai Purshottam Udeshi was a case of passenger travelling in a motor car. He was travelling for hire or reward. The vehicle was neither a

public service vehicle nor a goods vehicle, but it was a different class of vehicle. It was in that context that the Court had made certain observations that the plea that the words "third party" are wide enough to cover all persons except the person and the insurer is negatived as the insurance cover is not available to the passengers is made clear by the proviso to sub-section which provides that a policy shall not be required. Further, except where the vehicle is a vehicle in which passengers are carried for hire or reward or by a reason of or in pursuance of a contract of employment, to cover liability in respect of the death of or bodily injury to persons being carried in or upon or entering or mounting or alighting from the vehicle at the time of the occurrence of the event out of which a claim arises. On such a consideration, the Supreme Court has found that it was not required that a policy of insurance should cover risk to the passengers who are not carried for hire or rewards; as under Section 95 the risk to a passenger in a vehicle who is not carried for hire or reward is not required to be insured the plea of the counsel for the Insurance Company will have to be accepted and the Insurance Company held not liable under the requirements of the Motor Vehicles Act as has been clearly observed in para 13 that what was held in that case of Pushpabai (supra) is, with respect, consistent with the interpretation of Section 95 as given by the Supreme Court with regard to Section 95 as it stood before and after its Amendment.

12. In this view of the matter, in the facts and circumstances of this case, when it is clearly established on record that the truck was meant only for carrying goods, it had no system of carrying the passengers for hire or reward. Even otherwise the touch stone would be as to whether it was permissible for the vehicle in question to carry the passengers and therefore whether they are carried on hire or reward or even if by way of gratis as gracious passenger would not make any difference. In such cases, there is no question of insurance cover to the passengers. The insurance cover is in respect of the vehicle or the goods contained therein, but the insurance cover cannot be extended to the passengers who board a goods carrier or are allowed to board the goods carrier for hire or reward or even on gratis. The insurance cover in such cases can be made available to the employees who are required for the purpose of taking such vehicle. Neither the driver nor the employees who are in fact carrying the vehicle are authorised to allow any passenger from right side to board such vehicle and then thereafter in case of

accident, held the Insurance Company liable for the payment. If the driver or any of the employees of the owner of the vehicle do so and allow any passenger to board such vehicle, travel thereon, they do so at their own risk and the Insurance Company cannot be held liable for payment of any compensation to such passengers who are unauthorised and right from the inception when they start travelling in such vehicle, the focus is as to what is the class for which the vehicle is registered. If the vehicle is registered only for carrying goods and not for carrying passengers and yet the passengers are allowed to travel in such vehicles, they cannot seek protection of the umbrella of the insurance so as to get the compensation.

13. This Court, therefore, finds that the award as has been passed by the Motor Accident Claims Tribunal, in the instant case, does not suffer from any infirmity either of fact or of law. It warrants no interference whatsoever. The appeal has no merit. The same is hereby dismissed. In the facts and circumstances of this case, the parties are left to bear their own costs.

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Sreeram.